

- Employment Law
- Training
- Advice
- Tribunal
- Documents
- Consultancy
- Telephone Hotline

## Age Discrimination - and Retirement

### A. Background

The Employment Equality (Age) Regulations 2006 [SI 2006/1031] [abbreviation - "EEAR"] have been in force since October 2006.

The regulations affect retirement in particular, as well as all aspects of recruitment, employment and dismissal.

We are dealing here only with those elements that relate to retirement:

- there are substantial provisions (EEAR Schedule 2) in relation to **pension schemes**, and the application of non-discrimination rules in that context. But despite the introduction of a 'non-discrimination rule', there are substantial exceptions - the practical effect on pension schemes may actually be quite minor. The DTI Guidance explicitly says that the aim was to disrupt pensions law as little as possible.
- **Two-tier pension:** Note that EEAR reg 11(3), Sch 2 para 25 explicitly provides that the closure of a pension scheme, from a particular date, to workers who have not already joined it, is NOT subject to EEAR challenge. So for example, shorter servers who are only offered a 'money purchase' pension cannot claim under EEAR in respect of being denied access to the benefit of a 'final salary' pension scheme that was closed to new entrants from a particular date before they joined it.
- special provision is made in relation to dismissal on retirement:
  - EEAR provides that it is not unlawful to dismiss an employee who is over the age of 65 where the reason for dismissal is retirement. This has been challenged, and we are awaiting a European Court decision (since 1999!). In the meantime, all age discrimination related cases relating to this point are being 'held', and, no-one in the UK can say definitively whether compulsory retirement at 65 is lawful or is age discrimination.
  - Irenicon advise you to start the procedures by giving notice as set out below, but telephone us for up to date advice if an employee seeks to work beyond retirement age and you have reasons to consider not granting the request.

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Age Discrimination - retirement

This document contains brief general guidance on complex topics. Take specialist advice on particular situations before action.

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Page 1

- Employment Law
- Training
- Advice
- Tribunal
- Documents
- Consultancy
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- **not less than six months before retirement date:** employers must notify the employee in writing (between 12 and 6 months) before the proposed retirement date, giving:
  - the retirement date AND
  - the employee's right to make a request to the employer not to retire on the intended retirement date
- although the process for the employer to consider the request (if made) is set out in the Regulations (meetings, representations and appeal), no criteria are set out for the decision itself. It appears the Regulations simply intend that the employer should be required to think about allowing an individual to work beyond age 65 if they ask - but they can only ask once! ***Call us if you think you don't want to grant the request***
- broadly speaking, 65 was set out as the default retirement age, (though you will need advice if you have contracted for an earlier one), but this will come up for review by the ECJ in the case that has been referred to it, and again by Government in 2011
- dismissals in the run-up to retirement date may have the 'reason for dismissal' implied by statute as different to the stated reason, and run you into unfair dismissal problems. This looks likely to generate problems with managers, as being quite counter-intuitive. ***Please call us for advice if you are considering dismissing someone within a year of retirement for any reason whatsoever!***
- 'unjustified' retirement ages of below 65 are effectively outlawed by EEAR
- the old exclusion from unfair dismissal rights at age 65 was abolished, but the status of compulsory retirement dismissals remains less than clear until the European Court of Justice has ruled

## B. Checklist

### Documents to review:

- Employee Handbook 'Retirement' section will need an overhaul.
- 'manager guidance' documents
- pension documents will also need a careful review by your pension advisers. [Pension scheme trustees should be taking advice directly

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Page 2

- Employment Law
- Training
- Advice
- Tribunal
- Documents
- Consultancy
- Telephone Hotline

about the requirements in relation to them. We are looking solely at the employment law issues here.]

Processes to review:

- manager training courses/material - will need careful updating to take account of the provisions about 'close to 65' dismissals - which are going to set up a 'manager-trap' unless carefully dealt with
- retirement and pre-retirement materials and support
  - set up process for 'right to request' not to retire
- pension scheme review

**C. Conclusion**

Make sure no-one is compulsorily retired without following the proper procedure AND taking up to date advice at the relevant time.

*Christopher Head*  
Christopher Head  
Director  
Irenicon Ltd  
20 November 2007

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Page 3